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409537—41

# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. 355

HARVEY COAL CORPORATION, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Tennessee, Northern Division (R. 44–52, 66–67) is not officially reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 153–154) is reported in 118 F. (2d) 350.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 13, 1941 (R. 153). By order entered April 14, 1941, a petition for rehearing was denied (R. 154). After an order had been entered extending the time within which to file the petition to and including August 8, 1941 (R. 154), the petition for certiorari was filed August 7, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

In October 1917 taxpayer leased its coal properties under an agreement by which the lessee undertook the payment of all taxes which might be assessed against the lessor for 1917. In 1919, after a deficiency notice had been addressed to the taxpayer and received by the lessee, a claim for abatement, in the name of the taxpayer, was filed, signed by its former officer who was then employed by the lessee. As a result of negotiations extending until 1924, the claim was allowed in part. The taxpayer paid the balance in 1925. The question is whether the claim for abatement was valid so as to toll the statute of limitations under Section 611 of the Internal Revenue Act of 1928.

## STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

The facts as disclosed by the record and the opinion of the District Court (R. 44–52) may be summarized as follows:

Harvey Coal Company is a Tennessee corporation organized on March 16, 1915 (R. 129). On March 21, 1918, the company filed an income and excess profits tax return for the year 1917 showing taxes due and payable in the sum of $33,343.74. The principal office was reported as Staub, Kentucky, and the return, signed by its president and treasurer, was filed with the Collector of Internal Revenue for the District of Kentucky (R. 73, 132). The tax reported was assessed and paid and is not in controversy.

On October 30, 1917, prior to filing the 1917 return, the company leased its properties to Hazard Jellico Coal Company, a Delaware corporation (R. 130). Under the terms of the lease the lessee agreed to pay all taxes, including income taxes and excess profits taxes for the year 1917 which had been or might be assessed against the lessor. It was also agreed that E. L. Douglass, then general manager of Harvey Coal Company, should be placed in charge of the leased premises with full power and authority to direct and control the mining operations, improvement and development of the premises, and that in the event of the death, incapacity, or resignation of Douglass during the term of the lease, the Harvey Coal Company should have the right to name his successor (R. 130–131).

As contemplated in the agreement, Douglass left the employ of Harvey Coal Corporation and became vice president and general manager of the Hazard Jellico Coal Company (R. 72–73, 82).

Subsequently an investigation and audit was made of the 1917 tax return of the Harvey Coal Company, and in April, 1919, additional taxes of $44,319.50 were assessed (R. 33, 44, 86, 95, 123). A letter determining this deficiency was addressed to Harvey Coal Corporation, Staub, Kentucky (R. 95). This and other communications were received by the taxpayer's lessee at that address.

On July 24, 1919, in response to the demand for the additional tax, a letter was sent to the Collector of Internal Revenue at Danville, Kentucky, enclosing a check in the sum of $16,694.14, and a claim for the abatement of the balance of $27,625.36 (R. 102-103). The letter and the claim for abatement were signed in the name of the Harvey Coal Company, "by E. L. Douglass, General Manager" (R. 103). Concerning the claim for abatement, a letter from Harvey Coal Corporation, by C. H. Harvey, President, to the Commissioner of Internal Revenue, dated March 17, 1925, gives the following further information (R. 137):

> The officers of this company decided that this Claim for Abatement be filed as they had no information regarding this tax and in as much as under contract the tax should have been paid by the other parties all of the files regarding same was in their hands.

There was considerable correspondence with reference to the claim for abatement, and at least one conference was held at the request of Mr. Douglass and the firm of Waite, Schindel & Bayless, of Cincinnati.[1] Upon cross-examination, Mr. Schindel, a partner in this firm, testified that in his various conferences and letters with the Bureau of Internal Revenue he "invariably * * * gave them to understand" that he was representing the Harvey Coal Company (R. 81).

Several abatements were granted by the Bureau of Internal Revenue (R. 15, 86, 105, 115). The last was on November 17, 1924, when the taxpayer was notified that it had been allowed an additional amount of $2,346.37 on its claim, leaving a balance due of $19,812.91 (R. 15, 86). By this time Hazard Jellico Coal Company as lessee had become financially unable to fulfill its obligation under the lease agreement. It was in receivership from the middle of April, 1924 (R. 80). Therefore, on January 28, 1925, pursuant to demand made by the Commissioner of Internal Revenue, Harvey Coal Corporation paid the balance, together with interest in the amount of $9,203.06, or a total of $29,015.97 (R. 86–89). The corporation had been organized in 1924 and had taken over the assets and

[1] In one instance during the negotiations the firm signed a letter to the Deputy Commissioner of Internal Revenue as "attorneys for the Harvey Coal Company" (R. 112, 113, 114, 149).

liabilities of the Harvey Coal Company (R. 84, 130, 133).

After making the payment the taxpayer [2] then filed a series of claims for refund. The final claim was signed and sworn to on April 30, 1937, and stated as a further ground for refund that the Government was barred by the statute of limitations from collecting the amount claimed (R. 145). This ground is the basis of the original petition filed by the taxpayer (R. 1–11). The Government filed a plea of confession and avoidance alleging that the taxpayer had filed a claim for abatement which tolled the statute of limitations (R. 15). An amended petition (R. 18–24) was filed by the taxpayer alleging additional grounds for refund, but they are not pertinent to the issues raised by the petition for certiorari. The District Court sustained the Government's motion to strike the amended petition, and held, *inter alia,* that taxpayer could not "be heard to contend that the claims in abatement which suspend the statute of limitations were not filed or authorized by it, and that, therefore, the defendant's collection of the taxes was not after the statutory period expired" (R. 52). The decision of the District Court was

[2] For the purposes of this petition for certiorari, it will not be necessary to distinguish between Harvey Coal Company, against whom the tax was assessed, and Harvey Coal Corporation, by whom it was paid. Both concerns will therefore here be referred to as the taxpayer.

affirmed by the Circuit Court of Appeals (R. 153–154).

ARGUMENT

The Circuit Court of Appeals held that under the terms of the lease agreement the lessee was not only obligated to pay the 1917 taxes but as a necessary incident was vested with authority to contest their correctness and validity and to file a claim of abatement. In these circumstances, the claim which was filed on taxpayer's behalf was clearly effective to toll the statute of limitations, pursuant to the provisions of Section 611 of the Revenue Act of 1928, Appendix, *infra*. The conclusion of the court thus hinges primarily upon a factual determination in respect of the scope of the lessee's authority. It is fully substantiated by the terms of the lease agreement (R. 130).[3] Further, the fact that taxpayer left the files regarding the tax with the lessee (R. 137) indicates that the latter properly assumed responsibility in the matter.

There is no conflict of authority with the decision below upon this question. *Commissioner* v.

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[3] The state court decisions cited in taxpayer's brief (p. 14) do not militate against this conclusion; there is no reason to disagree with the general principle enunciated in *Denver Tramway Corp.* v. *Rumry*, 98 Colo. 24, 28, that:

"The relation of landlord and tenant exists by virtue of contract, and a tenant is not the agent of the landlord for any purpose, unless made so by specific agreement * * *."

*Bryson*, 79 F. (2d) 397 (C. C. A. 9), the only circuit court opinion cited for the proposition that the lessee here was not vested with authority to file the claim of abatement, involved readily distinguishable facts. In that case Bryson had signed a tax waiver as "Former Secretary of the Bryson-Robison Corp.," a dissolved corporation (p. 399). The court concluded (p. 401) that neither on its face nor in the light of the accompanying letter could the document be regarded as a valid waiver, since it was signed by a *former* secretary as such and since the letter emphatically put the Commissioner on notice that the signer considered himself only as a former officer of the corporation and that he did "not presume to act" for it. Here, on the other hand, the Hazard Jellico Coal Company was obligated under the lease agreement to pay the taxes and acted on behalf of the taxpayer in the matter until its receivership.[4]

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[4] It is true that the attachments which accompanied the claim for abatement in the instant case referred to E. L. Douglass as "former General Manager" (R. 99–102). But this alone cannot bring the case within the facts of the Bryson case, where the court found that the Commissioner was "emphatically" put on notice by the form of the waiver and the expressly worded accompanying explanation. In the instant case, there is no finding of notice to the Commissioner. The terms of the lease, the method of Douglass' signature on the claim itself, the absence of any disclaimer of presumption to act but, on the contrary, an express representation throughout of authority to act on behalf of taxpayer, all serve to dissipate the significance of the reference to Douglass as former manager.

Nor is certiorari warranted in respect of other issues raised in the opinion of the Circuit Court of Appeals. The court's decision does not rest upon estoppel, or upon the proposition that taxpayer may not assume an inconsistent position at the expense of the Government. Since the court already found that the lessee was empowered to file a claim of abatement on taxpayer's behalf, the suggestion that under one or the other of such principles the taxpayer had no right to question the authority of the lessee was merely offered at the end of its opinion as an alternative and supplemental reason for disapproving the refund.[5]

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[5] In any event, the authorities upon which taxpayer relies in this connection (Pet. 15–16) are not in conflict with the case at bar. In *Hull* v. *Commissioner*, 87 F. (2d) 260 (C. C. A. 4), the court found that the transaction had been investigated and all the facts were before the Bureau of Internal Revenue long prior to the expiration of the statute of limitations. Under these circumstances, it was held that the party knowing the facts cannot claim the benefit of estoppel. Similarly, in *United States* v. *S. F. Scott & Sons*, 69 F. (2d) 728 (C. C. A. 1), the court pointed out that error had originated out of misinterpretation of the law rather than ignorance of the facts concerning the assessment of the tax. Here, on the other hand, there has been no finding that the Commissioner either knew or should have known that the lessee was acting without authority on taxpayer's behalf, and the Commissioner relied on the abatement claim in delaying the collection of the tax.

## CONCLUSION

The decision of the court below is correct. There is no conflict of authority. No sufficient reason has been shown for review and the petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
*Acting Solicitor General.*
SAMUEL O. CLARK, JR.,
*Assistant Attorney General.*
HELEN R. CARLOSS,
WILLIAM L. CARY,
*Special Assistants to the Attorney General.*

AUGUST 1941.